

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	DECISION
In the Matter of Protest of:)	
)	CASE NO.: 2007-137
McCarter Mechanical, Inc.)	
)	
Materials Management Office)	POSTING DATE:
IFB No. 08-S7624)	
Package Thermal Heat Pumps for the)	DECEMBER 20, 2007
<u>Governor's School of the Arts</u>)	

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from McCarter Mechanical, Inc. (McCarter). With this invitation for bids (IFB), the Materials Management Office (MMO) attempts to procure 150 package thermal heat pumps for the Governor's School for the Arts and Humanities. The units being procured are the through-the-wall variety common in motels. In the letter, McCarter protested MMO's "bidding procedure" and the "intent to award" alleging that a) "Trane Comfort Solutions, Inc., being the apparent low bidder, was also the only supplier of the Package Terminal Heat Pumps allowed to bid per Amendment number 1", b) "by bidding as an installing contractor and being the local distributor for this equipment, in which the other contractors must purchase the equipment from, Trane Comfort Solutions, Inc., has control over and has influenced the outcome of the bid in their favor", c) "[t]he bid solicitation needs to be specific as to how many wall sleeves need to be changed so there are no differences in quantities in the bids."

After attempts to settle the matter proved unsuccessful, the CPO conducted a hearing December 12, 2007. Appearing before the CPO were McCarter, represented by Scott McCarter, President; Trane, represented by Joe Cain, General Sales Manager; the Governor's School for the Arts and Humanities (Governor's School), represented by Charles Tillotson, Vice President for Finance and Administration; and MMO, represented by John Stevens, State Procurement Officer.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On October 3, 2007, MMO published the IFB. [Ex. 1]
2. On October 15, 2007, a site visit was conducted at the Governor's School for interested bidders.
3. On October 19, 2007, MMO published Amendment No. 1. [Ex. 2]
4. On October 30, 2007, MMO opened the following bids received:

<u>Bidder</u>	<u>Bid Amount</u>¹
Trane	\$164,997
Clarkson Industrial	181,371
McCarter [Ex. 4]	234,660

5. On November 9, 2007, the CPO received McCarter's protest.

DISCUSSION

In the first and second issues of protest (noted as a) and c) above), McCarter alleged restrictiveness and ambiguity in the specifications. In the first issue, McCarter alleged that the specifications were restrictive in that bids were limited to one package thermal heat pump unit. As noted by McCarter, the IFB, required, "Replacement units shall be Trane Model PTHE-1201 with 3.5 KW auxiliary electric heater." Amendment No. 1 reiterated the requirement emphasizing the specification by noting "No substitutions" would be accepted.

MMO and the Governor's School acknowledge the specification, but insist compatibility with the existing units was necessary. In an email dated September 26, 2007, Buddy Fields, Director of Facilities for the Governor's School, wrote that the Trane units were necessary because:

- Trane units were originally installed during construction and since these are thru-the-wall units the size of the replacement units is critical so that the(y) fit perfect.

¹ The bids were subsequently adjusted through the application of the State's resident vendor and end-product preferences, but according to Mr. Stevens, the preferences did not alter the ranking of the bidders.

- We have already had to replace 26 PTAC units in the Residence Hall and it is imperative that we continue with the same units so that parts are interchangeable at all times for repairs.
- In our reconfiguration of our Residence Hall in 2008 – 2009 we will be installing a central control for all HVAC units in the Residence Hall. The Trane units that we are specifying in our scope will need to be identical to what we currently have to work with this central control tie-in.
- Trane Upstate Carolina was awarded our HVAC maintenance/service contract and will be doing follow up on correct installation and warranty on these units. [Ex. 5]

McCarter also took exception to the specifications in protest issue number 2 writing, “[t]he bid solicitation needs to be specific as to how many wall sleeves need to be changed so there are no differences in quantities in the bids.” McCarter wrote further, “During the pre-bid site visit, Buddy Fields stated that she wanted every wall sleeve (150) changed and new wall sleeves installed properly because of problems they were having with the condensate running back into the rooms. Amendment number 1, under section ‘Actual Work Specifications’ item II.c. states ‘New wall sleeves – if required.’ This is a very vague statement and leaves the bidding procedure up to individual discretion.”

In the second issue of protest (noted as b) above), McCarter alleged that, “By bidding as an installing contractor and being the local distributor for this equipment, in which other contractors must purchase the equipment from, Trane Comfort Solutions, Inc., has control over and has influenced the outcome of the bid in their favor. This constitutes an unfair trade for other bidders.” Trane responded that it offered the same price for the units to all competitors.

DETERMINATION

Two allegations of the protest regard the specifications being restricted to a single manufacturer’s product and uncertainty created by the amendment to the IFB regarding the number of sleeves to be replaced. The Consolidated Procurement Code requires, “All specifications shall be drafted so as to assure cost effective procurement of the state's actual needs and shall not be unduly restrictive.” [11-35-2730]

By their very nature, specifications set minimum requirements that limit competition on some level every time; whether the specification requests certain manufacturers or brands, or the performance requirements are set at a certain minimum level or size parameters eliminate certain products from the bidding. The Code allows the state to utilize specifications that require bidders to bid products that meet the state's actual needs. At issue here is whether or not the state complied with the Code's directive that specifications cannot be "unduly restrictive."

Regarding MMO's specification of Trane units, opinions varied at the hearing. With an embedded base of Trane units, some of which have already been replaced, the Governor's School felt that it needed to standardize to Trane units for management, operations, and maintenance purposes. The sleeves already in the walls of the residence hall certainly do limit replacement units to the same dimensions. Requiring Trane units may not have been necessary to meet those reasonable demands by the Governor's School, but awarding a contract for another brand of units would have left the Governor's School with a mixed breed of units because this procurement does not replace all 167 units in the residence hall, which would have defeated the Governor Schools goal of having interchangeable parts and controls for all of the units. Further, McCarter offered no specific information about comparable units for the CPO to consider.

The CPO does agree with McCarter that the requirement that sleeves must be replaced "if necessary" should have been more clear.² A review of the specifications reveals that the IFB offered clear direction regarding the wall sleeves. It read, "New wall Sleeves must be furnished as part of the unit installation for ALL units. Include patching/caulking around new sleeve as necessary. Include re-grouting and leveling new sleeve as necessary per manufacturer's installation instructions" [Ex. 1, p. 11, Actual Work Specifications, Item II.c.] The Amendment, on the other hand, confused the requirement, as it altered the specifications to read "New Wall Sleeves – If required." [Ex. 2, p. 4, Actual Work Specifications, Item II.c.] McCarter alleged that the ambiguity favored Trane because Trane holds the current contract for maintenance of the existing units. According to

² Better approaches might have included the School studying the problem and identifying the sleeves that required replacement and then specifying that number. More elementary, for evaluation purposes, the state could have a) estimated the sleeves to be replaced, based the bid evaluation on that estimate, and ask the bidders to bid a unit rate for providing and installing each additional sleeve that

McCarter, they raised the point during the walk through and Ms. Fields responded that she wanted every wall sleeve changed. Contrary to Ms. Fields' statement, the requirement was changed by Amendment No. 1 to replacing sleeves "if required."

The Amendment may favor Trane, which may have gained advanced knowledge of the condition of the sleeves as the maintenance contractor for the existing units. However, incumbent advantage is difficult to eliminate completely in any procurement. MMO and the Governor's School offered all prospective bidders a site visit. Additionally, Mr. McCarter stated that he visited the site a second time on his own. According to testimony received, no one can determine with absolute certainty which sleeves need to be replaced without inspecting every unit, which must occur during the performance of the contract. Under the IFB, Trane is contractually bound to replace all 150 sleeves "if required."³

The IFB warns bidders to ignore verbal communications informing them that they are "NOT binding" and reading further that "[a]ll binding changes to the solicitation will need to be addressed in a written addendum(s)." [Ex. 1, p. 9] The IFB also asked bidders to speak up: to "request an explanation of any ambiguities, discrepancies, errors, omissions, or conflicting statements" [Ex. 1, p. 5, Duty to Inquire]; to ask questions [Ex. 1, p. 6, Questions from Offerors]; and, if they are still dissatisfied, to protest [Ex. 1, p. 6, Protests and p. 9, Protests – CPO – MMO Address].

Instead of pursuing its concerns regarding the specifications further with MMO or filing a protest with the CPO during the solicitation, McCarter waited until the bids were opened and prices revealed to report the matter to the CPO. The Code requires prospective bidders to advise the CPO of grievances with the state's specifications during the solicitation process – to protest. Regarding the filing of a protest of a solicitation by the state, the Consolidated Procurement Code reads as follows:

A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(a) within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or

needed to be replaced, or b) bid all 150 sleeves to be replaced, then asking bidders to provide a unit price deduct for each sleeve not requiring replacement.

³ Unfortunately, the IFB does not specify who is authorized to decide whether a sleeve must be replaced or not.

other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue. (SC Code section 11-35-4210(1)(a).) (Emphasis added.)

MMO published the IFB on October 3, 2007, and published Amendment No. 1, the last solicitation document issued, on October 19, 2007. McCarter did not file its protest with the CPO until November 9, 2007, well after the 15-day filing period allowed by law. Consequently, the CPO lacks jurisdiction in any matter regarding the specifications.

The Code offers bidders the right to protest specifications during the solicitation process in order to avoid the dilemma before the CPO here; re-evaluating specifications after bidders' prices have been exposed. Except in extreme cases where specifications are grossly defective or restrictive, attempts to revisit specifications after bid opening invite bidder mischief or gaming of the procurement process. If McCarter felt that the specifications were prejudicial against it, McCarter should have protested the specifications, as allowed by 11-35-4210. The CPO finds that, in spite of the opinion that the specifications could have been prepared with greater clarity, ordering a re-solicitation now would be patently unfair to the two other bidders, both of whom offered lower bids than McCarter.

McCarter also protested the "intent to award", an act that has not occurred yet. Regarding award of an IFB, the Code requires, "notice of an award or an intended award of a contract to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids must be given by posting the notice at a location specified in the invitation for bids." [11-35-1520(10)] Once a notice of award or intent to award is posted, an actual bidder may protest such notice to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award. [11-35-4210(1)(b)] In this case, however, no such notice of award or intent to award has been posted by the State. Consequently, McCarter's protest of the "intent to award" is prematurely filed.

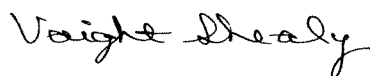
Nevertheless, McCarter objects to any award to Trane arguing that Trane Comfort Solutions, Inc., is the local distributor for Trane products, that Trane is also an installing contractor who bid in response to the

solicitation, and that, accordingly, Trane enjoys a price advantage over other bidders and that this constitutes an unfair trade practice.

South Carolina has a number of statutes relating to unfair trade practices for most types of business and industry. One statute declares that it is an unfair trade practice for a person or entity in both the wholesale and retail business to sell merchandise of like grade and quantity at retail at a price as low or lower as that same person or entity sells it at wholesale in the same town or locality. S.C.Code Ann. §§ 39-5-320 & 39-5-330. South Carolina has even enacted a prohibition against doing indirectly what is forbidden directly by banning retail outlets owned or controlled by wholesalers from engaging in such conduct. S.C.Code Ann. § 39-5-340. It appears to be this type of prohibited conduct which McCarter is accusing Trane Comfort Solutions, Inc.

The type of conduct alleged by McCarter was not established at the hearing on December 12, 2007. There was no evidence presented by McCarter to support a contention that Trane Comfort Solutions, Inc. was the beneficiary of any price advantage in purchasing the equipment for this contract. However, even if McCarter had established that Trane had enjoyed a price advantage which would ordinarily violate the unfair trade practice statutes, an exclusion to those statutes applies in this case.

The S.C.Code Ann. § 39-5-350 specifically excludes from the pricing statutes referred to above "sales at wholesale to . . . county, city, federal or state institutions or departments. . . ." As a result, even if the practice alleged had been established by McCarter and proven, sales to government entities are exempt from the prohibitions of the generally applicable law. To the extent that the protestant contends that Trane has violated federal law in its bidding practices, the facts set forth in the protest will not establish a violation of the same. See, e.g., Eximco, Inc. v. Trane Co., 737 F.2d 505 (5th Cir. 1984).



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

December 20, 20007

Columbia, S.C.

Date

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 66.1 of the 2007 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2007 S.C. Act No. 117, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).